STATE OF MICHIGAN

COURT OF APPEALS

DARRYL HAIRSTON,

Plaintiff-Appellant,

v

SHAPE CORPORATION,

Defendant-Appellee.

UNPUBLISHED
March 14, 2006

No. 257513
Ottawa Circuit Court
LC No. 03-047547-NO

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff was an employee of Adecco North America, L.L.C. (Adecco), a temporary employment service. In the spring of 2002, Adecco placed plaintiff in a temporary position with defendant Shape Corporation, an automobile-parts manufacturer. Plaintiff was assigned to work for defendant as a stamping-press operator. Plaintiff's job responsibilities included loading parts onto a stamping press, activating the press, and removing the finished parts. The press was equipped with a light guard, or "safety curtain," which prevented the press from operating when anyone was standing too close to it.

When plaintiff reported for the second shift on June 12, 2002, he noticed that the stamping press had been modified. Defendant had installed a new automatic-feed mechanism on the back of the press, and there was orange plastic mesh across the back of the press. Despite the presence of the orange mesh, plaintiff proceeded to manually load parts into the press as he had always done before. Unbeknownst to plaintiff, defendant had earlier deactivated the safety curtain light guard. As plaintiff was loading the first bumper, the stamping press began to operate. The press severed two fingers and a portion of a third finger from plaintiff's right hand, and cut through plaintiff's right hand, to the center of the palm. Two of the fingers were surgically reattached, but the other could not be saved. Plaintiff's injuries continue to cause a great deal of pain.

Plaintiff commenced this action, asserting claims of intentional tort, negligence, and breach of a contractual agreement to settle. The circuit court granted summary disposition for defendant on all claims.

We review the trial court's ruling on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We further review questions of law arising in workers' compensation cases de novo. *Cain v Waste Management, Inc (After Remand)*, 472 Mich 236, 244; 697 NW2d 130 (2005). This Court reviews the applicability of equitable doctrines such as waiver and estoppel de novo. See *West American Ins Co v Meridian Mutual Ins Co*, 230 Mich App 305, 309; 583 NW2d 548 (1998).

Plaintiff first argues that defendant was not his employer for purposes of the WDCA, but rather, was a third-party, subject to tort suit. We disagree. When an employee sustains a workplace injury or occupational disease, compensation under the WDCA is generally the employee's "exclusive remedy against the employer." MCL 418.131(1). However, the WDCA does not define the term "employer." *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 687; 594 NW2d 447 (1999). Plaintiff argues that because he was not party to a specific contract of hire with defendant, defendant could not have been his "employer" for purposes of the WDCA, citing MCL 418.161(1)(l). This argument is without merit.

While MCL 418.161(1)(l) states that "[e]very person in the service of another, under any contract of hire, express or implied" is an "employee" for purposes of the statute, this definition is not exhaustive. Rather, §§ 161(1)(a) through 161(1)(n) set forth the different circumstances under which a person constitutes an "employee" for purposes of the WDCA. Section 161(1)(n) provides that "[e]very person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury" is an "employee" under the WDCA, unless circumstances listed, none of which are present here, apply. Thus, because plaintiff was "performing service in the course of [defendant's] trade, business, profession, or occupation," the mere absence of a contract of hire is not sufficient to render plaintiff a non-employee.

Further, Michigan courts apply the "economic reality test" to determine whether an employer-employee relationship exists for purposes of the WDCA. *Clark, supra* at 687. Notably, under the economic realities test, an employee may have more than one employer at any given time. *Id*. at 690. In *Farrell v Dearborn Mfg Co*, 416 Mich 267, 272; 330 NW2d 397 (1982), the Court applied the economic realities test to "a labor broker situation in which temporary employment is provided to a business customer," such as that in the present case. The *Farrell* Court determined that "the exclusive remedy available to the employee in a labor broker situation is provided by the workers' compensation statute and . . . a separate tort action against the customer of the labor broker may not be maintained." *Id*. at 277. In *Kidder v Miller-Davis Co*, 455 Mich 25; 564 NW2d 872 (1997), the Court again concluded that a labor broker and its business customer constitute co-employers, because both entities retain control over the worker's duties and other crucial workplace decisions. *Id*. at 42-46. Moreover, even though a worker may continue to be paid by the labor broker itself, the labor broker is merely acting as a "payment conduit" for its business customer. *Id*. at 41. Finally, because business customers specifically utilize the services of labor brokers to realize their business goals, a common business objective is presumed in the context of a labor broker-customer relationship. *Id*. at 45. Applying *Farrell, supra*, and *Kidder, supra*, to the facts of this case, it is clear that defendant was plaintiff's employer for purposes of the WDCA.

Plaintiff also argues that defendant should be estopped from asserting that it was plaintiff's employer based on the language of the contract between defendant and Adecco, which provided that "employees assigned under this Agreement shall remain employees of Adecco."

We disagree. In *Kidder, supra* at 46, the Court noted that the contract is but one factor to consider under the economic reality test and, that the alone contract is not dispositive of the status of the parties.

Plaintiff next argues that defendant has waived, or should be estopped from asserting, the exclusive remedy provision on the basis of its insurer's negotiations and alleged agreement to settle. Plaintiff correctly observes that in the context of a third party injured by an insured, the insurer acts as the insured's agent in negotiating possible settlements. *Maxman v Farmers Ins Exchange*, 85 Mich App 115, 122; 270 NW2d 534 (1978). Thus, it is not beyond the realm of possibility that the conduct of defendant's insurer could have constituted a waiver by defendant itself. However, waiver and estoppel require affirmative acts or omissions. Because a waiver is the intentional choice to forego some advantage which could otherwise be asserted, it requires an *affirmative representation* by the party against whom it is claimed. *Roberts v Mecosta Co General Hospital*, 466 Mich 57, 64-65 n 4; 642 NW2d 663 (2002). Likewise, estoppel arises only "when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts . . . ." *Lichon v American Universal Ins Co*, 435 Mich 408, 415; 459 NW2d 288 (1990).

Here, plaintiff has failed to identify any affirmative representations on which his waiver and estoppel arguments stand. Although plaintiff averred in his affidavit that defendant's insurer had agreed to settle, he supported this position by averring that he was told "that meaningful talks would not occur until I had reached maximum medical improvement." Because reasonable minds could not conclude from this assertion that defendant's insurer made an actual, affirmative agreement to settle, plaintiff's waiver and estoppel arguments were factually insufficient to withstand summary disposition.

Plaintiff next contends that defendant committed an intentional tort by deactivating the safety curtain light guard, and that the WDCA's exclusive remedy provision is therefore inapplicable. We disagree. Section 131(1), the intentional tort exception to the exclusive remedy provision, provides that an employer may commit an intentional tort in two different ways: (1) by deliberately acting or deliberately failing to act with the intent to cause an injury; or (2) by willfully disregarding actual knowledge that an injury is certain to occur. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 149-150; 565 NW2d 868 (1997); see also *Travis v Dreis and Krump Mfg Co*, 453 Mich 149, 169-180; 551 NW2d 132 (1996).

Plaintiff asserts that defendant committed an intentional tort within the second category of § 131(1). To commit an intentional tort within this category an employer's act or failure to act must be more than mere negligence. It is not sufficient that an employer simply disregards the knowledge that a dangerous condition exists. *Id*. at 176. Nor is it enough that the employer acted with reckless disregard for the health, safety, and welfare of employees. *Bock v General Motors Corp*, 247 Mich App 705, 712-713; 637 NW2d 825 (2001). Rather, "willful disregard" requires that an employer "disregards actual knowledge that an injury is certain to occur." *Travis, supra* at 179.

"An incident 'certain to occur' cannot be established by reliance on the laws of probability or, the mere occurrence of a similar event…" *Alexander v Demmer Corp*, 468 Mich 896; 660 NW2d 67 (2003), citing *Travis, supra* at 174-175.

Thus, in *Travis, supra*, the Court determined that a defendant-employer did not have knowledge that an injury was "certain to occur" because an intermittently malfunctioning piece of machinery did not pose a "continually operating dangerous condition." *Travis, supra* at 182. Because the machine malfunctioned only at certain times, but functioned properly at other times, the *Travis* Court observed that it was not absolutely inevitable that the machine would malfunction at any given time. *Id*. Therefore, it could not be established that the defendant knew that injury was certain. *Id*. Further, the *Travis* Court determined that even if the defendant had possessed actual knowledge of a certain injury, the defendant still had not "willfully disregarded" that knowledge. *Id*. at 182-183. The Court noted that the defendant had made several adjustments and repairs to the machine since it had begun to intermittently malfunction. *Id*. The Court held that such repairs showed that the defendant had not willfully disregarded the dangerous condition. *Id*. at 183.

In the instant case, the facts surrounding defendant's conduct, even when viewed in a light most favorable to plaintiff, do not support a finding that defendant willfully disregarded the actual knowledge that plaintiff's injury was certain to occur.

Defendant submitted the affidavit of its safety and environmental manager, in which she averred that she was personally aware that the safety curtain light guard had been disabled in order to make modifications to the stamping press. Thus, plaintiff did present evidence that defendant had "actual knowledge" of the dangerous condition posed in this case.

However, the evidence was insufficient to establish that defendant "willfully disregard[ed]" the risk. Defendant's safety and environmental manager averred that upon deactivation of the safety curtain light guard, a "fixed barrier was stretched and securely fastened across the machine, in front of the light curtain," which consisted of "industrial strength orange mesh fencing." Further, plaintiff testified that he saw this orange mesh barrier stretched across the back of the stamping press when he reported for work on the day of his accident. Like the modifications and adjustments made to the die press in *Travis, supra*, defendant in this case took precautions against a potential risk by taking an active step to ensure against injury. The installation of a visible, orange mesh barrier in this case shows that rather than disregarding a known risk, defendant specifically appreciated the risk and took steps, albeit ineffective ones, to prevent injury. Defendant's conduct thus did not rise to the level of an intentional tort within the meaning of MCL 418.131(1).

Regarding the requirement that defendant have knowledge that an injury was "certain to occur," plaintiff's injury occurred during the second shift on June 12, 2002. The same stamping press, in the same condition, (i.e., with the safety curtain disengaged) had been operated without incident or injury during the first shift on June 12, 2002. Like the die press that malfunctioned only intermittently in *Travis*, it was therefore not inevitable that the stamping press in this case would cause a sure and certain injury at any given point in time. Because the stamping press had been operated without incident during the first shift, it could not be characterized as a "'continuously operative dangerous condition,' but rather [only as] a *potential* hazard." *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 755; 593 NW2d 219 (1999) (emphasis in original). Because plaintiff's injury was not inevitable and certain, it cannot be said that defendant had knowledge that injury was "certain to occur." *Travis, supra* at 182.

Plaintiff also argues that defendant should be liable in tort under the "dual-persona doctrine" exception to the WDCA's exclusive remedy provision. Again, we disagree. The dual-persona doctrine is a judicially created exception which acknowledges that in some circumstances an employee may bring a tort suit against an employer "for a work-related injury caused by the employer *in a role other than employer*." *Howard v White*, 447 Mich 395, 398; 523 NW2d 220 (1994) (emphasis in original). The doctrine is applicable only when "the employer has a second identity which is completely distinct and removed from his status as employer." *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 653; 364 NW2d 670 (1984). For the dual-persona doctrine to apply, an employer must posses "a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person," *id.* at 653, and the employment relationship must be "entirely unrelated or incidentally involved with the cause of action," *Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 256; 608 NW2d 487 (2000).

Here, plaintiff's accident was a direct result of his work for defendant. The employer-employee relationship was not "entirely unrelated or incidentally involved with the cause of action." *Id.* at 256. Thus, plaintiff's dual-persona claim merely amounts to an assertion that defendant failed to provide safe working conditions by modifying the press. However, the "specific obligation to make a safe product as a manufacturer/modifier is so intertwined with the employer's duty to provide a safe workplace that it cannot logically be separated into two distinct legal obligations." *Id.* at 247. Because the employer-employee relationship was integrally related to plaintiff's accident, the dual-persona doctrine is not applicable given the facts of this case.

Finally, plaintiff argues that defendant, by way of its general liability insurance carrier, agreed to settle his claims out of court and to forgo asserting the exclusive remedy provision. Plaintiff contends that this alleged agreement is now binding between defendant and plaintiff, and that defendant has breached its obligation to settle. The circuit court found plaintiff's claim deficient because plaintiff had not produced written evidence of the alleged agreement. Therefore, the circuit court found that the alleged agreement to settle was insufficient under MCR 2.507(H). Plaintiff asserts that MCR 2.507(H) is only applicable to *agreements to settle pending litigation*, and that because no litigation was pending at the time of the alleged agreement in this case, MCR 2.507(H) does not apply. Plaintiff is correct. The court rule applies, by its own language, to agreements or consents between the parties "*respecting the proceedings in an action*." MCR 2.507(H) (emphasis added). Because no "action" was pending at the time defendant's insurer allegedly agreed to settle, MCR 2.507(H) is inapplicable.

Nevertheless, the circuit court reached the correct result in granting defendant's motion for summary disposition.

In order to establish a claim for breach of contract, a plaintiff must first prove the existence of a valid contract. *Stoken v J E T Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988). When a motion is brought under MCR 2.116(C)(10), the moving party has the initial burden of supporting its position. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The burden then shifts to the nonmovant to establish that a genuine issue of disputed fact exists. *Id.* The nonmoving party may not rest upon mere denials or allegations, but must come forward with documentary evidence demonstrating the existence of a genuine issue of fact for trial. A genuine issue of material fact exists when the record leaves

open an issue upon which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Defendant asserted that there was no evidence a settlement agreement had been formed between plaintiff and defendant's insurer. Plaintiff asserts that the evidence consisted of "the letters signed by the insurance adjuster," which were apparently submitted to the circuit court.[1] However, rather than stating that defendant's insurer had in fact agreed to settle, these two letters provided that the insurer "would like to work with [plaintiff] towards a resolution of your claim once you have finished your treatment," and that "it will be at least one year before [plaintiff] will be finished treating and in a position to consider any settlement." Additionally, plaintiff submitted his own affidavit, in which he averred that defendant's insurer had agreed to settle, and that he was aware that "meaningful talks would not occur until I had reached maximum medical improvement."

As the letters and affidavit indicate, defendant's insurer never made an affirmative offer to settle, but rather agreed to discuss the possibility of settling at some point in the future. Further, by averring that "meaningful talks would not occur until I had reached maximum medical improvement," plaintiff implicitly admitted that defendant's insurer had *not yet* agreed to settle. At most, the evidence showed that defendant's insurer had agreed to work "*towards a resolution of [plaintiff's] claim*." Reasonable minds could not conclude that this evidence was sufficient to prove the existence of a valid contract. *West*, *supra* at 183. Because plaintiff failed to create a genuine issue of fact regarding the existence of a settlement agreement, summary disposition on this claim was proper.

Affirmed.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Karen M. Fort Hood

[1] These letters do not appear in the lower court file, but are attached to plaintiff's brief on appeal. However, defendant does not dispute the contention that these letters were submitted as documentary evidence. Therefore, we consider the letters as if they were submitted to the circuit court.